Case No. 55860-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NORTHWOOD ESTATES, LLC,

Respondent,

V.

LENNAR NORTHWEST, INC.

Appellant.

APPELLANT'S OPENING BRIEF

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I. IDENTITY OF THE PARTIES AND INTRODUCTION

The Petitioner in this case is Lennar Northwest, Inc. ("Lennar"). Lennar is engaged in the business of the construction and sale to the public of single- family residences. Lennar acquires its inventory of single- family building lots both through subdivision development for its own account and, by purchasing "finished" lots from other subdivision developers.

A finished lot is a lot where all the entitlements necessary to issue a permit to construct a residence have been obtained. This would include construction and approval by the permitting jurisdiction of all the plat improvements such as utilities, storm and septic sewer, roads, and required offsite improvements such as traffic mitigation etc.

This case concerns a purchase and sale agreement (the "PSA") together with Amendments to the PSA pursuant to which Lennar contracted to purchase "finished" lots in a residential subdivision developed by Northwood Estates, LLC, the Respondent ("Northwood"). Northwood's manager is Satwant Singh, a highly sophisticated subdivision developer.

The PSA (CP 147-169) included a condition precedent under which Lennar agreed to pay Northwood for 5 additional finished lots if Northwood was successful in obtaining a recorded "Plat Modification" creating those 5 lots by the closing date in the PSA- about a year out from mutual acceptance of the PSA. Northwood had not actually commenced the process of obtaining the Plat Modification by the closing date. So, a Second Amendment to the PSA (CP 169-172) gave Northwood an additional 1-year

period within which to complete the Plat Modification. Northwood still failed to obtain a recorded Plat Modification by the final deadline date.

As provided in the Second Amendment, Lennar completed the Plat Modification. Northwood nevertheless sued for payment for the additional lots (CP 1-5) contending that the PSA provision was a covenant not a condition. Lennar contended the provision was a condition and that the failure of the condition extinguished any payment obligation. The issue came before this Court on discretionary review.

This Court then concluded the provision was a condition precedent. *Lennar v Northwood*, 2020 WL 1033579 (2020), a copy of which is attached as Appendix 1. The case was remanded for consideration of 2 issues relating to whether enforcing the covenant would result in a harsh/extreme forfeiture: "we remand to the trial court to determine whether equitable relief is appropriate to prevent forfeiture and, if so, what form that relief should take." *Northwood Estate, LLC v. Lennar Nw., Inc.,* at 8,

This Court identified a number of factual issues to be considered generally in relation to the equities: "courts have considered nonexclusive factors such as the amount that would be forfeited without the equitable relief sought, whether the failure to meet the deadline was inadvertent, and whether the other party was prejudiced by the delay." At 6.

The second was related to the "time is of the essence" provision in the contract between the parties. The legal standard governing whether an extreme forfeiture will occur stated by the Court of Appeals was:

> Conditions precedent "will be excused if enforcement would involve ***extreme forfeiture*** or penalty and if the condition does not form ***an essential part*** of the bargain." *Ashburn v. Safeco Ins. Co. of Am.*, 42 Wn. App. 692, 698, 713 P.2d 742 (1986).

Northwood Estate, LLC v. Lennar Nw., Inc., at pg. 6, emphasis added. This Court went on:

> Here, ***the plat modification deadline arguably may have been essential to the contract*** because the plat modification was the only remaining task under the contract and the parties' time-is-of-the-essence provision suggests that a condition involving the modification deadline was important.

Northwood Estate, LLC v. Lennar Nw., Inc., at pg. 7 Emphasis added).

So, this Court was specifically granting Lennar an opportunity to avoid a finding of harsh/extreme forfeiture by explaining why the deadline for obtaining a recorded plat modification was material/essential to the contract, in light of the "time is of the essence" provision. This is clearly an issue of fact.

Lennar moved for summary judgment (CP 45-68) on the basis that, because of the time is of the essence provision, the deadline was material as a matter of law under a line of cases involving deadlines and "time is of the essence" provisions, starting with *Vacova Co. v. Farrell*, 62 Wash. App. 386, 814 P.2d 255 (1991) and ending with *Duke & Duke Constr., LLC v. Emery*, 2020 WL 1640237 (2020) a Division I Opinion issued 3 days before *Northwood Estate, LLC v. Lennar Nw., Inc.* The Motion was accompanied by the Declaration of Lennar's President (CP 142-143) explaining why Lennar includes a "time is of the essence" provision in its plat purchase

agreements and how the failure to meet a deadline affects Lennar's business. This testimony was undisputed.

The Trial Court denied the Motion based on a theory of "implied waiver" that was neither briefed nor argued by the parties. The Trial Court concluded that, by granting an extension, Lennar had impliedly waived the extended deadline the parties had just agreed to in writing. (TP 15:13-24; see, also; TP 12:9-14 and TP 13:2-6. The Order is CP 246-248.)

Northwood then moved for summary judgment on the "extreme forfeiture" issue (CP 249-259). Concurrently, Lennar propounded discovery on the issues identified by this Court (CP 303-310).

The Trial Court denied a motion under CR 56(f) by Lennar and granted Northwood's Motion entering judgment. This appeal is taken from (1) the Order denying Lennar's Summary Judgment Motion dated 11/25/20 CP: CP 246-248 and, (2) the Order granting Northwood's Motion and denying Lennar's CR 56(f) Motion: CP 322-324.

II. APPELLANTS ASSIGNMENTS OF ERROR

Appellant assigns error to:

1. The denial of Lennar's Motion for Summary Judgment;
2. The denial of Lennar's Motion for a CR 56 (f) continuance; and,
3. The grant of Northwood's Summary Judgment Motion.

III. ISSUES PRESENTED

1. Did the Trial Court commit error by denying Lennar's Motion on a ground raised by the Trial Court after briefing

had closed?

2. Did the Court commit error by concluding that, as a matter of law, Lennar had impliedly waived the "time is of the essence provision?

3. Did the Trial Court commit error by denying Lennar's Motion for Summary Judgment?

4. Assuming that the Trial Court did not commit error in denying Lennar's Motion for Summary Judgment, were there issues of material fact precluding summary judgment in favor of Respondent?

5. Did the Trial Court commit error by denying Lennar's CR 56(f) Motion?

IV. STATEMENT OF THE CASE

The basic facts are set forth in *Northwood Estates, LLC v Lennar Northwest, Inc.*, 2020 WL 1033579 (2020) as follows:

> In December 2015, Northwood entered into a purchase and sale agreement to sell 33 residential lots in the city of Edgewood, Washington to Lennar for $153,000 per lot. Paragraph 2.3 of the agreement provided that Northwood would obtain, at its expense, a plat modification to convert 8 of the lots into 13 separate lots, increasing the total number of lots by 5. If the plat modification was recorded within a year after closing, Lennar would pay Northwood an additional $765,000. If Northwood could not meet that deadline, it could extend the plat modification deadline once for up to three months.
>
> Paragraph 2.3 also provided that if Northwood could not obtain finished lots prior to closing, then it would be in default. Paragraph 7.1 defined "default" as the "failure of either party to perform any act to be performed by such party" if the failure continued for 10 days after written notice by the non-defaulting party. Paragraph 10.14 also provided, "Time is of the essence with respect to the performance by Buyer and Seller of each and every obligation under each and every provision of this Agreement."
>
> On December 6, 2016, the parties amended the agreement's plat modification provision, changing the modification deadline to December 1, 2017, and removing Northwood's

right to extend the deadline any further.[1] The second amendment reaffirmed, "If the Plat Modification has recorded not later than the Plat Modification Deadline, the number of Lots will increase by five (5) and Buyer shall pay Seller an additional Seven Hundred Sixty Five Thousand and No/100 Dollars ($765,000)." CP at 38. It then continued, "If Seller does not obtain the Plat Modification by the Plat Modification Deadline, Seller shall assign and turn over to Buyer Seller's applicant status to the Plat Modification and all other entitlements, development rights, and permits related thereto."

Closing occurred on December 8, 2016, and Northwood had almost a year to fulfill its remaining obligation to obtain approval for and record the plat modification by the new deadline of December 1, 2017.

On November 13, 2017, Northwood submitted the plat modification application to the city of Edgewood. The city then informed Northwood that the city council would not review the application until January 9, 2018 due to holiday schedules. On December 4, 2017 Lennar informed Northwood that it would not pay the $765,000 and that it would take over as the applicant with all related entitlements, development rights, and permits, as outlined in the second amendment. Northwood did not receive a 10-day notice of default and opportunity to cure, as is provided for in the agreement where one party is in default.[2] On December 13, 2017, Lennar received a notice of incomplete application. The notice requested that Lennar correct and resubmit the final plat drawing by removing buffer setback lines. The notice also requested that Lennar submit a corrected application with the signatures of parties authorized to act on its behalf. On January 9, 2018, Lennar submitted a revised application. The city deemed the application complete on January 10, 2018, granted the application, and recorded it on January 25, 2018.

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[1] The Second Amendment (CP 169-172) also provides that except as amended, all terms of the PSA remain in full force and effect. This would include to "time is of the essence" provision.

[2] The failure of a condition precedent is not a breach of contract and, therefore, the failure of Northwood to timely perform is not a default: *Patrick v. Kuske*, 55 Wash. 2d 517, 519, 348 P.2d 414, 415 (1960)("Failure of a condition to exist or to occur even though the condition is some performance by a party to the contract, is not a breach of contractual duty by him...")

> Lennar refused to pay Northwood for the additional five lots because Northwood had not complied with the deadline established in the second amendment. Northwood sued Lennar for breach of contract. It alternatively sought recovery under quantum meruit and unjust enrichment. In a declaration, Northwood's managing member stated that Northwood had spent approximately $260,000 and 750 hours on modifying the plat and preparing the application.

The first appeal arose from the Trial Court first ruling on summary judgment that the provision was a condition precedent and then reversing itself on the same record on reconsideration to conclude that the provision was a covenant. Simultaneously, the Trial Court dismissed the claims for unjust enrichment and quantum meruit. *Northwood Estates, LLC v Lennar Northwest, Inc.*, at 2-3.

On appeal, this Court ruled that the provision was a condition precedent and, remanded the matter as follows:

> We hold that the provision was instead a condition precedent. Because conditions precedent should not be strictly enforced if they effectuate a ***harsh*** forfeiture, we remand to the trial court to determine whether equitable relief is appropriate to prevent forfeiture and, if so, what form that relief should take.

Northwood Estate, LLC v. Lennar Nw., Inc., at 8, emphasis added. The only claim remaining after remand was whether enforcing the condition precedent would be a harsh or extreme forfeiture and, if so, what was the remedy.[3]

The legal standard governing whether an extreme forfeiture will occur identified by this Court was:

[3] The Court of Appeals and the applicable authority uses both terms.

> Conditions precedent "will be excused if enforcement would involve ***extreme forfeiture*** or penalty and if the condition does not form ***an essential part*** of the bargain." *Ashburn v. Safeco Ins. Co. of Am.*, 42 Wn. App. 692, 698, 713 P.2d 742 (1986).

Northwood Estate, LLC v. Lennar Nw., Inc., at pg. 6, emphasis added.

This Court also stated:

> Here, the plat modification deadline arguably may have been essential to the contract because the plat modification was the only remaining task under the contract and the parties' time-is-of-the-essence provision suggests that a condition involving the modification deadline was important.

Northwood Estate, LLC v. Lennar Nw., Inc., at pg. 7. The Court of Appeals noted the existence of a "time is of the essence" provision in the PSA (at CP 167: ¶ 10.14) identifying its role in the transaction as an issue as to whether an extreme forfeiture would occur.[4]

As this Court itself concluded, an extreme forfeiture cannot occur if timely performance is essential to/material to the contract. Lennar moved for summary judgment on the basis that, because of the time is of the essence provision, the deadline was material as a matter of law under *Duke & Duke Constr., LLC v. Emery*, 2020 WL 1640237 (2020) a Division I Opinion issued 3 days before *Northwood Estate, LLC v. Lennar Nw., Inc.* The Motion is CP 45-68.

To provide the Trial Court with the context resulting in the inclusion of the "time is of the essence" provision in the PSA, Lennar submitted the following testimony of its President, William Salveson (CP 142-143),

[4] The Second Addendum at ¶ 5 provides that except as amended in the Second Amendment, all other terms of the PSA "remain in full force and effect." This would include the time is of the essence provision.

which was not disputed:

> To give an idea of the scale of Lennar's operations, Lennar currently has in excess of 20 residential communities in various stages of development, construction and sales in this area of operation. I have overall management responsibility for all aspects of Lennar's business within this area of operations.
>
> The reason the "time is of the essence" provision is in Lennar's purchase and sale agreements is to emphasize that timelines/deadlines in Lennar's contracts are fundamental components of these agreements and to ensure that timelines/deadlines are strictly complied with.
>
> Deadlines relating to when finished lots will be available for the commencement of construction of residences are an essential part of planning for Lennar. Having specific delivery dates for buildable lots allows Lennar to schedule and allocate resources most efficiently. This includes both mobilizing resources for construction of residences and the scheduling of marketing and sales activities. This also includes managing financial resources including acquisition and production costs and cash flows from sales. Finally, open ended delivery dates can result in greater risk if the market changes adversely.
>
> In this particular case, the failure to make these lots available by the initial contract date had two impacts. If the lots had been available per the original schedule, the lots would have been built out and sold sooner. The delay reduces the rate of return on the project in addition to increasing holding costs. Second, the proceeds from sales would have been used to acquire additional lots on a shorter schedule generating greater revenue to Lennar.

CP at 142-143.

Whether the failure to comply with the deadline was inadvertent was specifically identified by this Court as a factor to be considered in relation to whether a forfeiture occurred: "courts have considered... whether the failure to meet the deadline was inadvertent:" *Northwood Estate, LLC v. Lennar Nw., Inc.*, at pg. 6. The following undisputed evidence was offered

on that issue.

The Second Addendum is CP 169-172, and is dated December 6, 2016, two days before the closing on December 8 for the first tranche of lots. The deadline date for recordation of an approved Plat Modification was December 1, 2017. Attached as Ex. 2 to the Brain Declaration (CP 273-310 at 296) is a timeline for the project. The application for preliminary approval of the Plat Modification, a requirement for the commencement of construction of the improvements of the Plat Modification, did not occur until September 27, 2017, 2 months before the deadline. The plat modification application was filed 18 days before the deadline in the Second Amendment to the PSA. None of this was disputed.

The application is governed by Chapter 16.07 of the Edgewood Municipal Code ("EMC"). Under EMC 16.07.030 the process for approval of a Plat "alteration" begins with submission of a ***complete*** application. Once the application is deemed complete, EMC 16.07.070 governs the consideration:

> A full subdivision or binding site plan vacation or ***alteration application*** shall be approved, approved with conditions, or denied within 120 days after a complete application has been submitted, unless the applicant consents in writing to an extension of the 120-day time period. (Ord. 18-523 § 1).

Mr. Singh, Northwood's managing member, testified that he was an experienced subdivision developer. CP 472 ("I have been in commercial development and real estate for decades."). Mr. Singh testified he was aware of the Ordinance. CP 475 at ¶ 13. Mr. Singh was therefore aware that if the Plat Modification Application was not submitted at the beginning of

August, a decision on the Plat Modification Application might not be made until after the deadline of December 1. Moreover, submission of an incomplete application would cause further delay because, the timeline for City of Edgewood review of the application would not commence until submission of a complete application.

It is undisputed that Respondent submitted its Plat Modification Application 18 days before the deadline for recordation of the Plat Modification. It is also undisputed that the City of Edgewood found the application to be incomplete. The failure to meet the deadline here does not satisfy any definition of the term "inadvertent." Dilatory or negligent would be a more apt term to describe what happened.

The Trial Court denied the Motion on the basis that Lennar had impliedly waived timely performance by extending the deadline for recordation of the Plat Modification.

> I have clearly said my understanding of what the Court of Appeals is doing here, and my understanding of the facts are that there was an implied waiver of the "time is of the essence" clause,...

TP 15: 13-24. The implied waiver theory was first raised by the Trial Court at the hearing.

This ruling actually makes no sense. As this Court noted in its prior opinion, the Second Amendment expressly removed Northwood's right to extend the deadline any further. Why would the parties preclude any further extensions, reaffirm the "time is of the essence" provision and set a new deadline if the parties did not intend that deadline was to be adhered to?

On December 23, 2020, Respondent moved for summary judgment. The Respondent submitted no additional evidence: "this brief is not going

to rehash the underlying facts again." CP 250 at line 6. So, the record before the Trial Court was much the same record on which Northwood had moved for a summary judgment on the issue of forfeiture in 2018 (CP 457-471) and which was before this Court on the appeal resulting in the remand in *Northwood Estate, LLC v. Lennar Nw., Inc.*

On 1/2/21, Lennar propounded discovery requests to Northwood. (CP 303-310). These requests requested information/documents relating to the actual cost and time commitment by Respondent incurred in the Plat Modification as well as the reasons the Plat Modification Application was submitted only 18 days before the deadline.

The Trial Court denied a motion under CR 56(f) by Lennar and granted Respondents' Motion entering judgment on behalf of Northwood. This appeal is taken from (1) the Order denying Lennar's Summary Judgment Motion dated 11/25/20: CP 246-248 and, (2) the Order granting Northwood's Motion and denying Lennar's CR 56(f) Motion: CP 322-324.

V. AUTHORITY AND DISCUSSION

A. Standard of Review:

The standard of review for the first 4 issues is de novo. An appellate court reviews a grant or denial of summary judgment de novo. *Green v. American Pharmaceutical Co.*, 136 Wash.2d 87, 94, 960 P.2d 912 (1998). *Kaplan v. Nw. Mut. Life Ins. Co.*, 115 Wash. App. 791, 799, 65 P.3d 16, 20 (2003). The standard of review of a denial of a CR 56 (f) continuance is abuse of discretion.

B. Issue No. 1:

The first issue is whether it is appropriate for a trial court to rule on summary judgment on grounds that were neither briefed nor argued. This is not the first time an appellate court has been asked to consider a ruling on summary judgment from the Trial Court, Judge Chushcoff, based on matters neither briefed nor argued by the parties: See, *Reed v Whiteacre*, 2008 WL 4635914 (2008)(" The trial court based its denial of summary judgment on an argument neither party made and on facts the record does not support." At 2.). The situation here is the same.

There is no published authority addressing directly the authority of a trial court to deny summary judgment based on an issue neither briefed nor argued by the parties. However, there is case law speaking to whether a court can grant a summary judgment based on an issue first raised by the moving party in a reply:

> It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment. Allowing the moving party to raise new issues in its rebuttal materials is improper because the nonmoving party has no opportunity to respond. It is for this reason that, in the analogous area of appellate review, the rule is well settled that the court will not consider issues raised for the first time in a reply brief.

Davidson Serles & Assocs. v. City of Kirkland, 159 Wash. App. 616, 637–38, 246 P.3d 822, 834 (2011). See, also, *In re Marriage of Watson*, 132 Wash. App. 222, 233, 130 P.3d 915, 920 (2006) (error to grant relief on grounds that neither party argued.)

The idea is that it is fundamentally unfair to grant relief on a theory as to which a party has had no opportunity to respond. This should be equally true whether the issue is raised by the moving party in a reply brief or by the Trial Court at oral argument after the briefing cycle has closed. The parties have no idea what legal standard the Trial Court purported to apply and only a limited idea of what facts the Trial Court relied on. Fundamentally, this is not how the process is supposed to work resulting in effectively, a denial of due process.

C. Issue No 2:

This is the issue of whether a finding of implied waiver of the time is of the essence provision was a legitimate ground for denying the Motion. As an initial note, the time is of the essence provision was not the only issue remanded by this Court. The Court of Appeals specifically referenced the question of whether the failure to meet the deadline was inadvertent. The culpability/responsibility of the party claiming the forfeiture in the failure of the condition would remain a factual issue in whether there was an extreme forfeiture whether or not the "time is of the essence" provision was in play.

This Court cited to *Vacova Co. v. Farrell*, 62 Wash. App. 386, 404, 814 P.2d 255, 265 (1991) in *Northwood Estates, LLC v Lennar Northwest, Inc.* at 6. The issue of waiver had not been raised as part of the prior proceedings before Judge Blinn and the citation was on another issue.

Nevertheless, in *Vacova*, the Court held that a waiver could occur when a payment was accepted after a default. This is consistent with the general rule that a waiver can be found if the benefits of the contract are accepted after a default. 31 C.J.S. Estoppel and Waiver § 88. The failure of a condition precedent is not a breach of contract and, therefore, the failure of Northwood to timely perform is not a default: *Patrick v. Kuske*, 55 Wash. 2d 517, 519, 348 P.2d 414, 415 (1960)

The *Vacova* Court cites to a case the Trail Court, Judge Chushcoff, argued in 1983 before taking the bench:

> Where a contract provides that "time is of the essence," a seller may insist on strict compliance with time of payment provisions. 3A A. Corbin, *Contracts* § 754 (1960). Upon the first default, the seller may declare an enforceable forfeiture.

Reed v. Eller, 33 Wash. App. 820, 824–25, 664 P.2d 515, 517–18. Then attorney Chushcoff successfully argued that because the seller under a real estate contract had repeatedly accepted late payments, the time is of the essence provision had been waived.

Simply different facts than here. There was no default. The deadline had not passed. Therefore, Lennar did not accept any benefits of Northwood's performance after the failure of the original condition/ deadline. Instead, Northwood got a grace period.

Timing is an issue here and the facts are undisputed. The PSA was mutually accepted on December 22, 2015. ¶ 1.6 of the PSA identifies "Plat Recording" as the condition to Lennar's obligation to close and pay for lots (at CP 148). ¶ 1.2 (at CP 147) provides that if the Plat Modification is

recorded "not later than one year following closing," Lennar will pay for the additional lots. The Second Amendment to the PSA (CP 169-172), is dated December 6, 2016. Closing of the original 33 lots took place on December 8, 2016. The deadline for completing the Plat Modification was amended before the transaction on the original 33 lots had closed and therefore before the original deadline had passed.

The general standard for an implied waiver is:

> Waiver—the intentional relinquishment of a known right—may be express or implied. Implied waiver will not be inferred; the party claiming waiver must present unequivocal acts or conduct that show an intent to waive.

Vehicle/Vessel LLC v. Whitman Cty., 122 Wash. App. 770, 778, 95 P.3d 394, 398 (2004). The basis for the Trial Court's finding of implied waiver was the Second Amendment. So, the issue is: By agreeing to a different deadline for completion of the Plat Modification before there had been a failure to meet the original deadline, did Lennar clearly and unequivocally waive the requirement that Northwood timely perform?

There are 2 undisputed transactional facts that need to be considered in this regard. First, as this Court noted with respect to the Second Amendment:

> On December 6, 2016, the parties amended the agreement's plat modification provision, changing the modification deadline to December 1, 2017, and ***removing Northwood's right to extend the deadline any further.***

Emphasis added. The parties were clearly and unequivocally agreeing that Northwood would not have an opportunity to complete the Plat

Modification after the deadline in the Second Addendum. Second, the Second Addendum at ¶ 5 (CP 169-170), expressly provides:

> This Addendum shall govern and control any conflict between it and the Purchase Agreement. Except as expressly amended hereby, the Agreement is confirmed and remains in full force and effect.

Thus, the Addendum confirms that the parties agreed that the "time is of the essence" provision remained in full force and effect with respect to the final deadline.

Which is where the error in the ruling on the implied waiver intersects the summary judgment in favor of Respondent. Again, this Court clearly considered that the importance of the "time is of the essence" in the transaction was a material issue of fact:

> Here, ***the plat modification deadline arguably may have been essential to the contract*** because the plat modification was the only remaining task under the contract and the parties' time-is-of-the-essence provision suggests that a condition involving the modification deadline was important.

Northwood Estate, LLC v. Lennar Nw., Inc., at pg. 7 Emphasis added). Lennar was wrongfully precluded from relying on a provision identified by the Court of Appeals as being relevant, potentially "important," to whether an extreme forfeiture had occurred.

The Trial Court ruled that Lennar impliedly waived the time is of the essence provision when (1) the parties specifically agreed that there would be no opportunity to complete performance of the condition after the deadline in the Second Addendum and (2) the parties agreed the time is of the essence provision remained in full force and effect with respect to the

new deadline. Lennar was clearly and unequivocally ***not*** waiving the time is of the essence provision.

The Trial Court's conception of the standard for implied waiver appears to have been based on a 40 year old appellate decision. However, the facts here are virtually identical to *Mid-Town Limited Partnership v Preston,* 69 Wash. App. 227, 848 P. 2d 1268 (2007) where an implied waiver of a time is of the essence provision was rejected by the Court of Appeals. The agreement was a real estate purchase and sale agreement setting a closing date and, containing a "time is of the essence" provision. The Addendum extending the closing deadline provided that "all terms and conditions of the sale agreement remain in full force and effect," exactly the same language as here. At 230.

> This means that the provision making time is of the essence remained in full force and effect.

At 232-33. Rather than waiving the time is of the essence provision, the parties here expressly reaffirmed it.

The Court stated the decisional rule as follows:

> A provision in an agreement making time is of the essence is generally treated as evidence of a mutual intent that specified times of enforcement be strictly enforced.

At 238. The Court rejected the argument that the deadline had been waived. At 233-34.

The finding of implied waiver by the Trial Court here is directly contrary to controlling authority on virtually identical facts. There was no

evidence of a waiver. The Trial Court's denial of Lennar's Motion on this basis was error.

C. Issue No. 3:

This is the issue of whether the Trial Court erred by denying Lennar's Motion for summary judgment. Simply stated, if the time is of the essence provision was not waived and made the deadline material to or essential to the contract, a claim of extreme forfeiture is unavailable as a matter of law.

The governing legal standard identified by this Court was:

> Conditions precedent "will be excused if enforcement would involve ***extreme forfeiture*** or penalty and if the condition does not form ***an essential part*** of the bargain." *Ashburn v. Safeco Ins. Co. of Am.*, 42 Wn. App. 692, 698, 713 P.2d 742 (1986)

Northwood Estate, LLC v. Lennar Nw., Inc., at pg. 6, emphasis added. As authority for this rule of law the Court of Appeals cited to *Ashburn,* 42 Wn. App. 692. *Ashburn* in turn cited to Restatement (Second) of Contract § 229 (1982):

> To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was ***a material part of the agreed exchange.***

Restatement (Second) of Contracts § 229 (1981) (emphasis added). As used by *Ashburn v. Safeco Ins. Co. of Am.* Court, "essential part of the bargain" is synonymous with "material part of the agreed exchange."

When this Court remanded the matter it commented:

Here, the plat modification deadline arguably may have been

> essential to the contract because the plat modification was the only remaining task under the contract and the parties' time-is-of-the-essence provision suggests that a condition involving the modification deadline was important.

Northwood Estate, LLC v. Lennar Nw., Inc., at pg. 7.

So, what is the legal consequence if the "time is of the essence" provision is material/essential to the PSA? The law is that a time is of the essence provision makes the deadline material to/essential to the PSA as a matter of law:

> The earnest-money agreement in question is clear and free from ambiguity as to those points essential for decision. Time is made the essence of the agreement, and a termination date is fixed. Payment was not tendered until after the agreement by its terms had expired. Absent conduct giving rise to estoppel or waiver, no further action on the part of appellants was required to effectuate the termination. ***There is no forfeiture involved, for the agreement, by operation of its time provisions, became legally defunct.*** Cowley v. Foster, 143 Wash. 302, 255 P. 129 (1927); Pavey v. Collins, 31 Wash.2d 864, 199 P.2d 571 (1948); 91 C.J.S. Vendor and Purchaser s 99 (1955).

Nadeau v. Beers, 73 Wash. 2d 608, 610, 440 P.2d 164, 166 (1968) (emphasis added).

The decision in *Vacova* likewise turned on a "time is of the essence" provision:

> As for Mr. Farrell's contention that time was not of the essence with respect to the payment of the 3–day note, when an agreement makes time of the essence, fixes a termination date, and there is no conduct giving rise to estoppel or waiver, the agreement becomes legally defunct upon the stated termination date if performance is not tendered.

62 Wash. App. 407.

The same result occurred in a more recent case: *Duke & Duke Constr., LLC v. Emery*, 2020 WL 1640237 (2020):

> While Duke & Duke challenges whether the delay in depositing the money was material, the agreement's "time is of the essence" language is dispositive on this issue. See *Vacova*, 62 Wn. App. at 407 (affirming court's grant of summary judgment based on material breach and rejecting party's contention that time was not of the essence where the agreement expressly said time was of the essence and fixed a termination date).

Duke & Duke Constr., LLC v. Emery, at 3. The only facts the Court relied on were: (1) there was a contractual provision requiring a performance by a date certain (2) the contract contained a time is of the essence provision and, (3) the defendant failed to meet the deadline.

In this case, there is an explicit contractual deadline by which Northwood was obligated to obtain recordation of the Plat Modification. The "time is of the essence" provision remained in "full force and effect" after the Second Amendment. Because of the time is of the essence provision, the contractual deadline is material/essential to the contract. Because the deadline is material to the contract, there is no "extreme forfeiture" as a matter of law. The failure of the Trial Court to dismiss the "extreme forfeiture" claim under these circumstances was error. The extreme forfeiture claim should not have survived to be a basis for summary judgment in favor of Northwood.

D. Issue No. 4:

Again, the case was remanded for consideration of 2 issues relating to whether enforcing the covenant would result in a harsh/extreme forfeiture: "we remand to the trial court to determine whether equitable relief is appropriate to prevent forfeiture and, if so, what form that relief

should take." *Northwood Estate, LLC v. Lennar Nw., Inc.,* at 8. This Court identified 3 specific factual issues when the case was remanded going to whether the remedy was available: (1) was the failure to meet the deadline inadvertent: (2) was the time is of the essence provision essential/material to the PSA and (3) was Lennar prejudiced. In Lennar's view, issues 1 and 3 represent issues of fact and, issue 2 an issue of law.

The fact of prejudice – issue number 3, was undisputed as Northwood made no effort to controvert the testimony of Mr. Salvesen on the subject. To the extent that the materiality of the "time is of the essence" provision represents an issue of fact, Mr. Salvesen's testimony as to the role of the provision in the transaction should be dispositive.

It remains the contention of Lennar that the evidence relating to whether the failure to meet the deadline for recordation of the Plat Modification establishes beyond any dispute that the failure was not inadvertent.

Northwood was candid that it was not offering any additional evidence in support of its motion. Respondent recited what it considered to be the undisputed material facts at CP 312. In considering these facts, this Court is required to draw all reasonable inferences in favor of Lennar.

The "undisputed" facts Northwood contends go to whether the remedy of extreme forfeiture would be available were stated in Northwoods CR 56 Motion (CP 249-259) as follows.

"*The delay was December 1 2017 to January 9, 2018."* (CP 251) In

fact, the PSA originally called for the Plat Modification to be finished and recorded by closing of the PSA; ¶ 1.2 (CP 1470, which it is undisputed was December 2016. The actual delay was over a year.

"The delay in part, related to the City of Edgewood not processing such applications over the holidays." (CP 251) To the extent that this fact is intended to suggest the delay was inadvertent, Mr. Singh was a sophisticated developer. It can be inferred that he was aware there might be an issue getting an application reviewed over the holidays.

More to the point, Mr. Singh admits being aware the City could take up to 120 days to process the application. No explanation has ever been offered as to why the Application for the Plat Modification was submitted only 18 days before the deadline for recordation of the Plat Modification. Given that Northwood had 7 days short of a year to obtain recordation, clearly, there is an issue of fact as to whether the failure to meet the deadline was inadvertent.

"The Plat submission by Northwood was complete..." (CP 251). This is a direct misstatement of fact. Northwood's submission was not complete as it is undisputed that the application was originally rejected by the City of Edgewood: "On December 13, 2017, Lennar received a notice of incomplete application." *Northwood Estate, LLC v. Lennar Nw., Inc.* at 2. Technically, the 120 day review period did not even begin until after the second deadline had passed.

"Satwant Singh has alleged – and Lennar has not denied – that the

delay did not cause any damages." (CP 252) However, the failure of a condition precedent is not a breach of contract and does not cause damage as a matter of law: *Patrick v. Kuske*, 55 Wash. 2d 517, 519, 348 P.2d 414, 415 (1960)("Failure of a condition to exist or to occur even though the condition is some performance by a party to the contract, is not a breach of contractual duty by him..."):See, also, *Tacoma Northpark, LLC v. NW, LLC*, 123 Wash. App. 73, 79, 96 P.3d 454, 457 (2004):

> But the nonoccurrence of a condition precedent prevents the promisor [Northwood in this case] from acquiring a right .... or deprives it of one, but it does not subject the promisor [Northwood] to liability. *Ross,* 64 Wash.2d at 236, 391 P.2d 526.

Id. at 79. Liability for damages. Lennar could not have suffered contractual damages as a matter of law.

More to the point, damages was not the factor identified by this Court as going to the equities. The factor identified by this Court in relation to the equities was prejudice:: "courts have considered nonexclusive factors such as ... whether the other party was prejudiced by the delay." At 6.

The testimony by Lennar's President as to prejudice was undisputed:

> In this particular case, the failure to make these lots available by the initial contract date had two impacts. If the lots had been available per the original schedule, the lots would have been built out and sold sooner. The delay reduces the rate of return on the project in addition to increasing holding costs. Second, the proceeds from sales would have been used to acquire additional lots on a shorter schedule generating greater revenue to Lennar.

CP 142-143.

However, in remanding, this Court's direction was not limited to whether the remedy was available. This Court also spoke to what the remedy might be:

> Such relief may include extension of an equitable grace period to Northwood to complete its performance of the condition, reduction of the $765,000 contract price based on the costs or other harm incurred by Lennar as a result of the delay, payment of costs to Northwood for its time and effort spent preparing the plat modification application, or some combination of these or other possible remedies.

Northwood Est., LLC v. Lennar Nw., Inc., at 7.

Lennar was denied the ability to quantify the harms it unquestionably suffered as a result of Northwood's dilatory conduct.

"Northwood spent about $260,000 on plat improvements..." (CP 251). Payment of costs involves a material issue of fact. Lennar contested these expenditures based on Respondent's own records:

> Singh testified by declaration that the plat modification work involved: "surveying, engineering, excavation so as to add and move utility stubs, reworking curbing and gutters as well as driveway approaches." So, the costs claimed by Northwood include the costs to re-do plat improvements installed to obtain final plat approval for the first tranche of lots. If the Plat Modification had been completed as contemplated in the Purchase and Sale Agreement, it is a material question as to whether these costs would have been incurred. In other words, Northwood appears to be claiming costs for the Plat Modification caused by its own failure to perform as originally provided in the PSA.
>
> There is an invoice; Brain Dec. Ex. 3 produced by Northwood which shows $88,000 in payments to a contractor for: "existing sewer inspection and grouting, excavate for gas power and electrical, expose all pipes for gas company bed pipes and backfill same push dirt to

> maintain plan elevations for lots, install storm for lots, install playground, excavate for school access." This invoice appears to cover most, if not all, of the actual construction services Mr. Singh testified were required for the Plat Modification *including grading*. Based on the invoices, the work started in March 2017 and ran to December. This appears to be all the actual construction work described by Singh and evidenced by the other documents.
>
> The biggest challenge to Northwood's expense claim of $260,000 of plat modification costs relates to grading. Based on 2 checks in the documents produced by Northwood dated 2/26/16 and 3/24/16; Brain Dec. Ex. 4, Northwood is claiming $110,000 in grading expenses over the expenses referenced in the $88,000 invoice. These are accompanied by invoices referencing excavation expenses relating to "additional lots." However, this would have been a year before design work began on the plat modification but during the initial construction phase when mass grading for the entire site would occur. It predates by a year and one half, the submission for preliminary plat approval of the Plat Modification. How exactly did Northwood expend $110,000 on grading for lots which would not be designed for over a year and not approved for construction for a year and one half?
>
> The invoice does not state how the amount was calculated. It is typical in the industry for mass grading cost to be based on a fixed amount per cubic yard. In another Lennar plat under construction at the same time, the per cubic yard cost was $12.85. If you use that number for estimating the amount of earth moved represented by these invoices, you come up with 8600 cubic yards. This would be pushed around the site rather than transported. But, to give you a graphic of the volume, a standard dump truck load is cubic 14 yards. This is enough dirt to fill 614 dump trucks. This seems to be far more dirt than would be involved in 5 lots. Whether these checks represent construction services not related to the Plat Modification is an open question as to which Lennar should be entitled to conduct discovery.

CP 275-276. The documents on which this discussion is based are attached to the Brain Dec. in Opposition; CP 273-310. From these facts, it could be reasonably inferred that Northwood in fact did not incur $260,000 in costs on the Plat Modification.

In short, there were material issues of fact with respect to each of the issues identified by Northwood as undisputed.

Issue No. 5:

The standard governing review of denial of a CR 56 Motion is as follows:

> CR 56(f) permits a trial court to continue a summary judgment motion when the party seeking a continuance offers a good reason for the delay in obtaining the discovery. In addition, the party must provide an affidavit stating what evidence the party seeks and how it will raise an issue of material fact to preclude summary judgment. *Qwest Corp. v. City of Bellevue,* 161 Wash.2d 353, 369, 166 P.3d 667 (2007) (quoting *Butler v. Joy,* 116 Wash.App. 291, 299, 65 P.3d 671 (2003)). We review the trial court's refusal to grant a continuance for abuse of discretion. *Qwest,* 161 Wash.2d at 369, 166 P.3d 667.

Durand v. HIMC Corp., 151 Wash. App. 818, 828, 214 P.3d 189, 195 (2009). The threshold questions are (1) were there issues of fact which could be raised by Lennar's proposed discovery, and (2) was Lennar dilatory for not seeking the discovery earlier. The latter was not raised as a basis for opposing Lennar's request for additional discovery.

Instead, Respondent stated as follows:

> This reply will assume for the purposes of this Motion that everything Lennar is alluding to is true. ... We will assume that discovery will show that less than $260,000 was spent. We will assume less hours were worked. We will even assume that the deadline was and [sic] essential to the bargain and material.

Basically, Northwood is arguing that all of this is irrelevant to whether equitable relief should be available.

To begin with: "Whether a party is entitled to equitable relief "is in large part a matter addressed to the discretion of the trial court, with discretion to be exercised in light of the facts and circumstances of the particular case." *Heckman Motors, Inc. v. Gunn*, 73 Wash. App. 84, 88, 867 P.2d 683 (1994). Accord: *Borton & Sons, Inc. v. Burbank Properties, LLC,* 9 Wash. App. 2d 599, 607, 444 P.3d 1201, 1205, review granted, 194 Wash. 2d 1016, 455 P.3d 120 (2020), and aff'd, 196 Wash. 2d 199, 471 P.3d 871 (2020). The availability of equitable relief and the form it should take is a fact issue.

The contention that none of this represented a fact issue was pretty much the exact opposite of what this Court said the first time the case was before it.

The case was remanded for consideration of 2 issues relating to whether enforcing the covenant would result in a harsh/extreme forfeiture: "we remand to the trial court to determine whether equitable relief is appropriate to prevent forfeiture and, if so, what form that relief should take." *Northwood Estate, LLC v. Lennar Nw., Inc.,* at 8,

This Court identified a number of factual issues to be considered generally in relation to the equities: "courts have considered nonexclusive factors such as the amount that would be forfeited without the equitable relief sought Respondent actually expended, whether the failure to meet the deadline was inadvertent, and whether the other party was prejudiced by the delay." At 6.

The legal standard governing whether an extreme forfeiture will occur stated by the Court of Appeals was:

> Conditions precedent "will be excused if enforcement would involve ***extreme forfeiture*** or penalty and if the condition does not form ***an essential part*** of the bargain." *Ashburn v. Safeco Ins. Co. of Am.*, 42 Wn. App. 692, 698, 713 P.2d 742 (1986).

Northwood Estate, LLC v. Lennar Nw., Inc., at pg. 6, emphasis added.

This Court went on:

> Here, ***the plat modification deadline arguably may have been essential to the contract*** because the plat modification was the only remaining task under the contract and the parties' time-is-of-the-essence provision suggests that a condition involving the modification deadline was important.

Northwood Estate, LLC v. Lennar Nw., Inc., at pg. 7 Emphasis added). Whether the deadline was material to the PSA was specifically identified by this Court as a factor in whether equitable relief could be granted and, under the very authority cited by this Court, a determination that the deadlines was material to the contract would preclude a finding of extreme forfeiture as a matter of law.

The discovery sought by Lennar was addressed specifically to why the deadlines in the PSA and Second Amendment were not met and, what it really cost in time and money to get the Plat Modification done.

In a case involving an equitable remedy dependent on these individual facts and circumstances, it is hard to understand how whether Respondent inflated both the amount of time expended on the Plat

Modification would not be relevant to what remedy should be available. Likewise, given that the Respondent had failed to even begin the Plat Modification before the original deadline, how it managed to fail to do so after being given a second year is clearly relevant to whether equitable relief should be available.

The Trial Court commented that it was simply implementing the prior decision of this Court: "I have clearly said my understanding of what the Court of Appeals is doing here ...." CP at 61. The fact of the matter is that the Trial Court ignored what this Court had said. That should define an abuse of discretion.

V. CONCLUSION

What happened here is pretty obvious. The Trial Court relied on a 40 year old conception of the law governing implied waivers based on *Reed v. Eller*, 33 Wash. App. 820, 824–25, 664 P.2d 515, 517–18. However, the facts here are virtually identical to *Mid-Town Limited Partnership v Preston,* 69 Wash. App. 227, 848 P. 2d 1268 (2007) where an implied waiver of a time is of the essence provision was rejected by the Court of Appeals. So, the Trail Court did essentially the same thing it did in *Reed v Whiteacre*, 2008 WL 4635914 (2008)(" The trial court based its denial of summary judgment on an argument neither party made and on facts the record does not support." At 2.).

The clear weight of the authority is that where time is of the essence to the contract, a deadline is material/essential as a matter of law. But, for

the Trail Court's clear error on the issue of implied waiver, the standard that this Court previously applied - that the remedy of extreme forfeiture is only available if the deadline is not material/essential to the contract, would have required dismissal of Northwood's claim for this equitable remedy.

Even if this were not the case, material issues of act existed as to whether the remedy would be available under the very standards previously enunciated by this Court. So, while the Trial Court suggested that it was merely implementing the prior holdings of this Court in this case, the fact is the Trail Court simply ignored them.

Accordingly, Lennar respectfully requests that this matter be remanded with direction that the denial of Lennar's Summary Judgment be vacated and judgment entered on Lennar's Motion dismissing Northwood's claims. In the alternative, to the extent that this Court concludes an issue of fact exists with respect to Northwood's entitlement to an equitable remedy, Lennar requests that this matter be remanded with a direction to vacate the Judgment in favor of Northwood and that the matter proceed to trial.

DATED this 21st day of May, 2021.

BRAIN LAW FIRM PLLC

/s/Paul e. Brain
Paul E. Brain, WSBA #13438
Counsel for Appellant

APPENDIX 1

12 Wash.App.2d 1038

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

Northwood Estate, LLC v. Lennar Northwest, Inc.

Court of Appeals of Washington, Division 2. | March 3, 2020 | Not Reported in Pac. Rptr. | 12 Wash.App.2d 1038 | 2020 WL 1033579 *(Approx. 8 pages)*

NORTHWOOD ESTATE, LLC, a Washington State limited liability Company, Respondent,

v.

LENNAR NORTHWEST, INC., a Delaware corporation, Appellant.

No. 52000-1-II

Filed March 3, 2020

Appeal from Pierce County Superior Court, Docket No: 18-2-04512-1, Honorable Grant Blinn, Judge.

Attorneys and Law Firms

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UNPUBLISHED OPINION

Glasgow, J.

*1 ¶1 Northwood Estate LLC contracted to sell 33 residential lots to Lennar Northwest, Inc. In relevant part, an amendment to their agreement provided that if Northwood successfully recorded an approved plat modification by a specified deadline, the number of lots would increase by five and Lennar would pay Northwood an additional $765,000. When the deadline passed without successful approval and recording, Lennar assumed control of the modification application and refused to pay Northwood the additional $765,000. Northwood sued Lennar for breach of contract and included alternative claims of quantum meruit and unjust enrichment.

¶2 Lennar argued the relevant provision was an unsatisfied condition precedent excusing Lennar from payment. The trial court ultimately agreed with Northwood that the plat modification provision was instead a contractual obligation, and so Lennar was not excused from payment, but it could seek damages for Northwood's delay. The court granted summary judgment to Northwood on its breach of contract claim and granted summary judgment to Lennar rejecting the quantum meruit and unjust enrichment claims.

¶3 Lennar obtained discretionary review of the breach of contract decision. Northwood counters that the trial court was correct to rule in its favor because treating the provision as a condition precedent would result in forfeiture, and forfeitures are disfavored. In the alternative, Northwood argues that if the provision was a condition precedent, we should employ equitable remedies to prevent the forfeiture of $765,000 that would result from enforcement of the condition. In that event, Northwood asks that we reinstate its equitable claims.

¶4 We reverse the trial court's conclusion that the plat modification provision was a contractual promise and its grant of summary judgment to Northwood on this basis. We hold that the relevant provision created a condition precedent and recognize that conditions precedent should not be strictly enforced if they effectuate a harsh forfeiture. We remand to the trial court to determine whether any equitable relief is appropriate to prevent forfeiture in this case and, if so, what form that relief should take.

FACTS

¶5 In December 2015, Northwood entered into a purchase and sale agreement to sell 33 residential lots in the city of Edgewood, Washington to Lennar for $153,000 per lot. Paragraph 2.3 of the agreement provided that Northwood would obtain, at its expense, a plat modification to convert 8 of the lots into 13 separate lots, increasing the total number of lots by 5. If the plat modification was recorded within a year after closing, Lennar would pay Northwood an additional $765,000. If Northwood could not meet that deadline, it could extend the plat modification deadline once for up to three months.

¶6 Paragraph 2.3 also provided that if Northwood could not obtain finished lots prior to closing, then it would be in default. Paragraph 7.1 defined "default" as the "failure of either party to perform any act to be performed by such party" if the failure continued for 10 days after written notice by the nondefaulting party. Clerk's Papers (CP) at 29. Paragraph 10.14 also provided, "Time is of the essence with respect to the performance by Buyer and Seller of each and every obligation under each and every provision of this Agreement." CP at 33.

*2 ¶7 On December 6, 2016, the parties amended the agreement's plat modification provision, changing the modification deadline to December 1, 2017, and removing Northwood's right to extend the deadline any further. The second amendment reaffirmed, "If the Plat Modification has recorded not later than the Plat Modification Deadline, the number of Lots will increase by five (5) and Buyer shall pay Seller an additional Seven Hundred Sixty Five Thousand and No/100 Dollars ($765,000)." CP at 38. It then continued, "If Seller does not obtain the Plat Modification by the Plat Modification Deadline, Seller shall assign and turn over to Buyer Seller's applicant status to the Plat Modification and all other entitlements, development rights, and permits related thereto." CP at 38.

¶8 Closing occurred on December 8, 2016, and Northwood had almost a year to fulfill its remaining obligation to obtain approval for and record the plat modification by the new deadline of December 1, 2017.

¶9 On November 13, 2017, Northwood submitted the plat modification application to the city of Edgewood. The city then informed Northwood that the city council would not review the application until January 9, 2018 due to holiday schedules. On December 4, 2017 Lennar informed Northwood that it would not pay the $765,000 and that it would take over as the applicant with all related entitlements, development rights, and permits, as outlined in the second amendment. Northwood did not receive a 10-day notice of default and opportunity to cure, as is provided for in the agreement where one party is in default. On December 13, 2017, Lennar received a notice of incomplete application. The notice requested that Lennar correct and resubmit the final plat drawing by removing buffer setback lines. The notice also requested that Lennar submit a corrected application with the signatures of parties authorized to act on its behalf. On January 9, 2018, Lennar submitted a revised application. The city deemed the application complete on January 10, 2018, granted the application, and recorded it on January 25, 2018.

¶10 Lennar refused to pay Northwood for the additional five lots because Northwood had not complied with the deadline established in the second amendment. Northwood sued Lennar for breach of contract. It alternatively sought recovery under quantum meruit and unjust enrichment. In a declaration, Northwood's managing member stated that Northwood had spent approximately $260,000 and 750 hours on modifying the plat and preparing the application. This included, for example, engineering, surveying, excavation, and the reworking of driveway approaches, curbing, and gutters. He further stated that he had not intended to assume the risk of the modification not being recorded in time, and that he was no longer in control of the application once it was submitted to city officials, who informed him after submission that recording may be delayed by its holiday schedule.

¶11 Both parties moved for summary judgment. Lennar argued that the amended plat modification provision established a condition precedent—that Northwood would obtain the modification by the deadline—and so once Northwood failed to meet that condition, Lennar was excused from payment. Northwood countered that the provision should instead be read as a contractual promise in order to avoid a forfeiture, such that Northwood's failure to meet the deadline constituted a minor breach but did not excuse Lennar from paying the $765,000. In the alternative, Northwood argued that if the provision was a condition precedent, Northwood was entitled to recovery under unjust enrichment or quantum meruit.

¶12 The trial court initially concluded there was a condition precedent, but indicated that unjust enrichment or quantum meruit may be available to avoid enforcement because enforcement would result in a forfeiture. The court dismissed the breach of contract claim but concluded that issues of fact existed with respect to Northwood's claims for unjust

enrichment and quantum meruit. The parties would therefore proceed to trial on those claims.

*3 ¶13 Both parties moved for reconsideration. Lennar argued that the trial court should have dismissed Northwood's unjust enrichment and quantum meruit claims, while Northwood argued the court should have interpreted the plat modification provision as a contractual promise. On reconsideration, the trial court agreed with Northwood that the provision was not, in fact, a condition precedent. The court also granted Lennar's motion to dismiss Northwood's quantum meruit and unjust enrichment claims. The court determined that the only remaining issue for trial would be the amount of offset damages to Lennar caused by Northwood's delay, even though Lennar had not filed a counterclaim for damages.

¶14 Lennar sought discretionary review on the condition precedent issue, which we granted.

ANALYSIS

I. INTERPRETATION OF THE PLAT MODIFICATION PROVISION

A. Standard of Review

¶15 In reviewing a grant of summary judgment, we apply the same standard as the trial court. Summary judgment is appropriate " 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *DeVeny v. Hadaller*, 139 Wn. App. 605, 616, 161 P.3d 1059 (2007) (quoting CR 56(c)). We consider the evidence and the reasonable inferences therefrom in the light most favorable to the nonmoving party. *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 864, 324 P.3d 763 (2014). " 'We review the trial court's conclusions of law de novo.' " *DeVeny*, 139 Wn. App. at 616 (quoting *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.3d 562 (2002)).

¶16 "The moving party bears the burden of first showing that there is no genuine issue of material fact." *State v. Grocery Mfrs. Ass'n*, 5 Wn. App. 2d 169, 185, 425 P.3d 927 (2018), *review granted*, 193 Wn.2d 1001 (2019). Where reasonable minds could reach only one conclusion from the admissible facts in evidence, that issue may be determined on summary judgment. *Sutton*, 180 Wn. App. at 864-65.

¶17 "When interpreting a contract, our primary objective is to discern the parties' intent." *Wm. Dickson Co. v. Pierce County*, 128 Wn. App. 488, 493, 116 P.3d 409 (2005). Contract interpretation is a question of law reviewed de novo where, as here, the " 'interpretation does not depend on the use of extrinsic evidence.' " *Kelley v. Tonda*, 198 Wn. App. 303, 312-13, 393 P.3d 824 (2017) (quoting *Spectrum Glass Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 129 Wn. App. 303, 311, 119 P.3d 854 (2005)). Summary judgment therefore is appropriate where the only dispute is over the interpretation of particular contract language, without reliance on extrinsic evidence. *Id.* at 313. The parties here do not dispute any material facts, but rather dispute the proper interpretation of the plat modification provision based on the contract language.

B. The Plat Modification Provision is a Condition Precedent

¶18 Lennar argues that the trial court erred in interpreting the plat modification provision as a contractual promise,[1] rather than as a condition precedent. We agree that the provision creates a condition precedent.

¶19 A condition precedent is an event that must occur before there is a right to immediate performance of a contract. *Tacoma Northpark, LLC v. NW. LLC*, 123 Wn. App. 73, 79, 96 P.3d 454 (2004). If the condition does not occur, the parties are excused from performance. *Id.* In contrast, the breach of a contractual promise subjects the promisor to liability for damages, but it does not necessarily discharge the other party's duty of performance. *Id.*

*4 ¶20 Therefore, if the second amendment is a condition precedent, then Lennar was not obligated under the contract to pay Northwood the additional $765,000 for the five additional lots once Northwood failed to record the plat modification at the deadline. However, if the second amendment is a promise, then Lennar may be entitled to damages from Northwood, but still must pay Northwood for the additional lots.

¶21 Whether a contract provision is a condition precedent or a contractual promise depends on the intent of the parties, to be determined from a fair and reasonable construction of the language used in light of all the surrounding circumstances. *Lokan &*

Assocs., Inc. v. Am. Beef Processing, LLC, 177 Wn. App. 490, 499, 311 P.3d 1285 (2013). "[W]ords such as 'provided that,' 'on condition,' 'when,' 'so that,' 'while,' 'as soon as,' and 'after' suggest a conditional intent, not a promise." *Tacoma Northpark*, 123 Wn. App. at 80 (quoting *Jones Assocs., Inc. v. Eastside Props., Inc.*, 41 Wn. App. 462, 467, 704 P.2d 681 (1985)). The terms "subject to" and "contingent upon" likewise demonstrate an intent to form a condition precedent. *Id.* And the *Jones Associates* court noted that a provision using the term "if" created an express condition precedent in that case. 41 Wn. App. at 467-68 & n.4.

¶22 Where it is doubtful whether words create a contractual promise or an express condition precedent, we will interpret them as creating a promise. *Tacoma Northpark*, 123 Wn. App. at 80. This is because forfeitures are disfavored, so when resolving doubts as to whether a condition precedent exists, " 'an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.' " *Jones Assocs.*, 41 Wn. App. at 469 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 227(1) (1981)). On the other hand, "if the term that requires the occurrence of the event as a condition is expressed in unmistakable language, the possibility of forfeiture will not affect the interpretation of that language." RESTATEMENT, *supra*, § 229 cmt. a.

¶23 We conclude that the second amendment created a clear condition precedent. The amendment provided, "*If* the Plat Modification has recorded not later than the Plat Modification Deadline, the number of Lots will increase by five (5) and Buyer shall pay Seller an additional Seven Hundred Sixty Five Thousand and No/100 Dollars ($765,000)." CP at 38 (emphasis added). "If Seller does not obtain the Plat Modification by the Plat Modification Deadline, Seller shall assign and turn over to Buyer Seller's applicant status to the Plat Modification and all other entitlements, development rights, and permits related thereto." CP at 38.

¶24 The use of the term "if" makes clear that Lennar's payment to Northwood of $765,000 is conditioned on Northwood obtaining the plat modification by the specified deadline. Under the second amendment, Northwood assumed the risk of not getting the modification recorded before the deadline. The parties agreed to an extension of the modification deadline and removed Northwood's ability to extend it any further. Although Northwood did not have any direct control over how long it would take for city officials to approve the application after submission, it had full control over the submission and yet did not submit the application until only two weeks before the deadline. Furthermore, the city required a change to the application that Northwood had submitted before the city could process it.

*5 ¶25 Northwood argues that the parties' agreement did not create a condition precedent because it would enable Lennar to "walk[ ] away with everything." Br. of Resp't at 11-12. Northwood cites to *Thatcher v. Salvo*, 128 Wn. App. 579, 585-87, 116 P.3d 1019 (2005), where the court found an unfulfilled condition precedent, and as a result, the buyer kept their money while the seller kept their property. Northwood contends this case is different because Lennar received five additional lots, while Northwood had to forgo the promised $765,000, and it spent $260,000 on the plat modifications. Thus, Lennar received a windfall that was absent in *Thatcher.*

¶26 But in *Thatcher*, there was no dispute that the contract contained a condition precedent. 128 Wn. App. at 585-87. Both parties were returned to their original position, but that was a *consequence* of the unfulfilled condition precedent and not a *prerequisite* for finding a condition precedent in the first place, as Northwood appears to argue. *Id.* The fact that Lennar ended up with a windfall in this case may implicate equitable remedies, but it does not bear on whether the provision was a condition precedent in the first place where it is clear from the contract language that one party's performance is conditioned on some other act occurring first.

¶27 Northwood also argues that we should apply the principles articulated in *Jones Associates* that both conditions precedent and forfeitures are disfavored. 41 Wn. App. at 469-70. Forfeitures are disfavored, and where there is some doubt as to whether a condition exists, we prefer interpretations that do not result in a forfeiture. *Id.* at 469. But the *Jones Associates* court rested its decision on the fact that the express language of the provision did not contain any words clearly creating a condition precedent. *Id.* at 467. It was therefore "unclear whether the parties intended obtaining King County approval to be a condition precedent to payment under the contract." *Id.* In contrast, in this case, it is clear that the express language of the plat modification proviso created a condition precedent: *if*

the plat modification was recorded by the deadline, *then* the number of lots would increase and Lennar would pay Northwood an additional $765,000.

¶28 Northwood next argues that the second amendment did not create a condition precedent because it must be read in context with the rest of the contract, which contained default provisions addressing remedies when a party failed to perform. Paragraph 2.3 of the original agreement separately provided that if Northwood could not obtain the required finished lots prior to closing, it would be in default. In addition, paragraph 7.1 defined "default" as the "failure of either party to perform any act to be performed by such party" if the failure continued for 10 days after written notice by the nondefaulting party. CP at 29. Northwood argues that in the context of these provisions, the plat modification provision in the second amendment should be read as a contractual promise because the plat modification was an act to be performed by Northwood. According to Northwood, its failure to meet the December 1, 2017 deadline should have been interpreted as a failure to perform under paragraph 7.1 of the agreement, and Lennar should have notified Northwood and given it 10 days to cure the failure before nonperformance could be deemed a default.

¶29 This argument ignores the fact that closing had already occurred, and the provision addressing failure to obtain finished lots before closing specifically invoked the default paragraph 7.1. In contrast, the provision at issue here regarding plat modification postclosing does not refer to the default provision. If the parties had intended for the plat modification to be encompassed by paragraph 7.1, they could have explicitly stated as much, as they did with respect to the requirement that Northwood obtain finished lots before closing. Instead, they used language that signaled that obtaining a plat modification was a condition precedent to Lennar paying Northwood the additional $765,000, as well as language that described what would happen in the event that Northwood could not obtain the modification.

*6 ¶30 In sum, we hold that, based on the plain language of the second amendment, the parties intended for the plat modification provision to create a condition precedent. We next consider whether Northwood's failure to meet the condition should nevertheless be excused to avoid forfeiture.

C. Northwood May Be Entitled to Equitable Remedies to Prevent a Forfeiture

¶31 Northwood argues in the alternative that, even if the plat modification provision is a condition precedent, it should nevertheless not be strictly enforced in order to avoid a forfeiture. We agree that equitable remedies may be appropriate and remand for the trial court to make this determination.

1. Equitable grace period to avoid forfeiture

¶32 " '[E]quity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.' " *Proctor v. Huntington*, 169 Wn.2d 491, 500, 238 P.3d 1117 (2010) (alteration in original) (quoting *Arnold v. Melani*, 75 Wn.2d 143, 152, 437 P.2d 908, 449 P.2d 800, 450 P.2d 815 (1968)). Forfeitures are not favored in law and to avoid their harshness, courts have granted equitable remedies to avoid the hardship that often results from strict enforcement. *Pardee v. Jolly*, 163 Wn.2d 558, 574, 182 P.3d 967 (2008). Conditions precedent "will be excused if enforcement would involve extreme forfeiture or penalty and if the condition does not form an essential part of the bargain." *Ashburn v. Safeco Ins. Co. of Am.*, 42 Wn. App. 692, 698, 713 P.2d 742 (1986); *see also Kilcullen v. Calbom & Schwab, PSC*, 177 Wn. App. 195, 204-05, 312 P.3d 60 (2013) ("A trial court has the authority to excuse a condition to performance ... where enforcing the condition would cause disproportionate forfeiture."); RESTATEMENT, *supra*, § 229. " 'To justify a forfeiture for the violation of the condition, the violation must be wilful and substantial.' " *Port of Walla Walla v. Sun-Glo Producers, Inc.*, 8 Wn. App. 51, 59, 504 P.2d 324 (1972) (quoting *In re Estate of Murphy*, 191 Wash. 180, 188, 71 P.2d 6 (1937), *rev'd on other grounds*, 193 Wash. 400, 75 P.2d 916 (1938)).

¶33 For example, where strict enforcement of a forfeiture would result in hardship and " 'do violence to the principle of substantial justice between the parties' " under the facts of a case, courts may excuse performance of a condition by extending a grace period for the party violating the condition to complete their performance. *Ryker v. Stidham*, 17 Wn. App. 83, 89, 561 P.2d 1103 (1977) (quoting *Dill v. Zielke*, 26 Wn.2d 246, 252, 173 P.2d 977 (1946)); *see Rains v. Lewis*, 20 Wn. App. 117, 122, 579 P.2d 980 (1978). In other words, the court may " 'rewrite' " the contract to provide a reasonable amount of time for the offending party to complete performance before allowing forfeiture and to set terms whereby the contract can be reinstated. *Vacova Co. v. Farrell*, 62 Wn. App. 386, 405, 814 P.2d 255 (1991). Whether a grace period is warranted depends on the equities in each

particular case. *Pardee*, 163 Wn.2d at 574. In determining whether an equitable grace period is appropriate, courts have considered nonexclusive factors such as the amount that would be forfeited without the equitable relief sought, whether the failure to meet the deadline was inadvertent, and whether the other party was prejudiced by the delay. *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wn. App. 203, 218-20, 242 P.3d 1 (2010).

*7 ¶34 In *Pardee*, our Supreme Court remanded to the trial court to consider, in light of the "significant forfeiture" at issue, whether the facts and circumstances of that case demanded that an equitable grace period be extended. 163 Wn.2d at 576. That case involved the termination of an option to purchase after Pardee failed to timely notify the property owner that he was exercising the option. *Id.* at 572. But because Pardee had expended over $20,000 and 2,500 hours of work improving the property, the court concluded that he may have been entitled to a grace period to avoid the forfeiture. *Id.* at 576.

¶35 *Pardee* followed the reasoning of two Court of Appeals cases, *Wharf Restaurant, Inc. v. Port of Seattle*, 24 Wn. App. 601, 605 P.2d 334 (1979), and *Heckman Motors, Inc. v. Gunn*, 73 Wn. App. 84, 867 P.2d 683 (1994). In *Wharf Restaurant*, a long term lessee failed to timely exercise an option to renew its lease, although it had made substantial improvements to the property and intended to renew. 24 Wn. App. at 603. The court considered the equities of the case, noting equity's abhorrence of forfeitures, and concluded that a grace period should be extended to enable the lessee to renew the option. *Id.* at 611-12. In doing so, the court considered the following factors: (1) whether the failure to exercise the option was inadvertent rather than intentional, culpable, or grossly negligent; (2) whether the lessee made valuable permanent improvements; (3) whether the lessor was prejudiced by the untimely notice; (4) the length of the lease; and (5) whether the lessor contributed to the delay. *Id.* at 612-13.

¶36 In *Heckman Motors*, in contrast, we held that the lessee failing to renew an option was not entitled to a grace period because it had not made substantial improvements to the property, there was a substantial delay in exercising the option, and the lessor had done nothing to contribute to the delay. 73 Wn. App. at 88-89. We noted that whether an equitable grace period is appropriate is largely within the trial court's discretion, and the trial court there determined that equity did not demand an exception to excuse the untimely exercise of the option. *Id.* at 88.

¶37 Here, the plat modification deadline arguably may have been essential to the contract because the plat modification was the only remaining task under the contract and the parties' time-is-of-the-essence provision suggests that a condition involving the modification deadline was important. However, apart from the boilerplate time-is-of-the-essence provision, Lennar does not point to anything in the record showing that timeliness was an essential part of the bargain or that Lennar suffered substantial harm or prejudice as a result of the delay. Nor is there any evidence that Northwood's failure to record the modification in time was willful, intentional, or even grossly negligent. Finally, without a grace period or other equitable relief, the forfeiture would be extreme: the inability to recover the $260,000 expended, the additional 750 hours of work expended, other forgone opportunities, and the lost anticipated profits that Northwood would have received as a result of the $765,000 payment. In contrast, Lennar essentially received five extra lots at no apparent significant additional expense.

¶38 In part because it incorrectly concluded that the second amendment did not contain a condition precedent, the trial court did not expressly consider an equitable grace period or other equitable relief in the face of Northwood's failure to satisfy a condition precedent. Because providing an equitable remedy is within the trial court's discretion and because the trial court in this case has not yet made this determination, we remand for the trial court to determine whether equitable relief is appropriate and, if so, what form it should take. *See Pardee*, 163 Wn.2d at 576. Such relief may include extension of an equitable grace period to Northwood to complete its performance of the condition, reduction of the $765,000 contract price based on the costs or other harm incurred by Lennar as a result of the delay, payment of costs to Northwood for its time and effort spent preparing the plat modification application, or some combination of these or other possible remedies.[2] *See Emerick v. Cardiac Study Ctr., Inc.*, 189 Wn. App. 711, 730, 357 P.3d 696 (2015) ("[A] trial court has broad discretionary authority to fashion equitable remedies."). A party does not need to plead damages for the trial court to consider all types of remedies in equity, including, for example, reducing the $765,000 by an amount that Lennar was harmed by Northwood's delay. The trial court may hear additional evidence to inform its determination.

2. Unjust enrichment and quantum meruit

*8 ¶39 Northwood also argues that if the modification provision is a condition precedent, we should remand for the trial court to reinstate its equitable claims for unjust enrichment and quantum meruit. We disagree.

¶40 " 'A party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract.' " *Boyd v. Sunflower Props., LLC*, 197 Wn. App. 137, 149, 389 P.3d 626 (2016) (quoting *Chandler v. Wash. Toll Bridge Auth.*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943)). Unjust enrichment and quantum meruit are used to fill in gaps in a contract related to an unforeseen event or in situations where there is no contract governing the parties' relationship. *Young v. Young*, 164 Wn.2d 477, 484-86, 191 P.3d 1258 (2008); *Hensel Phelps Constr. Co. v. King County*, 57 Wn. App. 170, 174, 787 P.2d 58 (1990). Neither remedy is available if the claim is covered by the terms of a contract. *Boyd*, 197 Wn. App. at 149; *Douglas Nw., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 683, 828 P.2d 565 (1992).

¶41 Here, the parties have a detailed contract that explicitly provided for what would happen in the event the plat modification provision was not recorded by the agreed upon deadline. As discussed above, the relevant question is whether equity demands that the contractual plat modification provision not be strictly enforced in order to avoid an extreme forfeiture. We accordingly decline to reinstate the unjust enrichment and quantum meruit claims.

II. ATTORNEY FEES

¶42 Northwood asks for attorney fees on appeal. In its reply brief, Lennar suggests that it would be entitled to attorney fees as the prevailing party, but does not explicitly request attorney fees on appeal. Under RAP 18.1(a), a party must request fees to be entitled to them on appeal.

¶43 Where a contract provides that attorney fees and costs shall be awarded to one of the parties, we shall award reasonable attorney fees and costs to the prevailing party. RCW 4.84.330; *Connell Oil Inc. v. Johnson*, 5 Wn. App. 2d 856, 865, 429 P.3d 1 (2018). Paragraph 10.19 of the parties' agreement entitles the prevailing party in any legal proceeding to attorney fees and costs. Nevertheless, because we remand to the trial court for further proceedings, neither party is yet a prevailing party. We decline to award either party attorney fees at this stage.

CONCLUSION

¶44 We reverse the trial court's conclusion that the plat modification provision was a contractual promise and its grant of summary judgment to Northwood on this basis. We hold that the provision was instead a condition precedent. Because conditions precedent should not be strictly enforced if they effectuate a harsh forfeiture, we remand to the trial court to determine whether equitable relief is appropriate to prevent forfeiture and, if so, what form that relief should take.

¶45 A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Worswick, P.J.

Cruser, J.

All Citations

Not Reported in Pac. Rptr., 12 Wash.App.2d 1038, 2020 WL 1033579

Footnotes

1 The parties use the term "covenant," whereas the case law uses the term "contractual obligation" or "contractual promise." There being no meaningful distinction, we adopt the language used in the case law.

2 In equity to avoid forfeiture, Washington courts have crafted remedies specific to the circumstances of a particular case. For example, courts have also allowed conditional reinstatement of a real estate contract, *Falaschi v. Yowell*,

24 Wn. App. 506, 510, 601 P.2d 989 (1979), a right of prepayment in full, *Terry v. Born*, 24 Wn. App. 652, 656, 604 P.2d 504 (1979), and substitution of a reasonable time for completing payment, *Kilcullen*, 177 Wn. App. at 205-06.

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Case No. 55860-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

NORTHWOOD ESTATES, LLC,

Respondent,

V.

LENNAR NORTHWEST, INC.

Appellant.

CERTIFICATE OF SERVICE OF APPELLANT'S OPENING BRIEF

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I hereby certify under penalty of perjury that on May 21, 2021, I caused a copy of the Appellant's Opening Brief to be served on Counsel for Respondents by email service agreement.

Dated this 21st day of May, 2021

/s/ Paul E. Brain WSBA # 13438

Counsel for Appellant

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